

No. 49504-0-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

CANDACE RALSTON,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR MASON COUNTY

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

- 1. This Court should strike the discretionary legal financial obligations because the trial court failed to apply the correct statutory standard and its finding that Ms. Ralston has the ability to pay is clearly erroneous.**

Before a court orders a defendant to pay discretionary costs, it is required to find she is able to pay those costs based upon an assessment of the defendant's financial resources and the burden payment of those costs would impose. RCW 10.01.160(3).

The State concedes the argument it made below – that the trial court should find Ms. Ralston had the ability to pay \$43,456.87 in discretionary legal financial obligations (LFOs) because she did not have any physical impairments preventing her from obtaining gainful employment – did not satisfy the requirements of RCW 10.01.160(3).

Resp. Br. at 9; RP 3-4. Specifically, the State concedes,

under *Blazina* the trial court must make a finding that the defendant has the ability to pay the specific amount of discretionary LFOs at issue rather than to merely find that the defendant does not suffer from a disability and that he or she, therefore, had some unmeasured ability to pay some partial, but undetermined, amount of the discretionary LFOs.

Resp. Br. at 9 (referring to *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015)).

The State also acknowledges that, by its own calculations, the amount Ms. Ralston is required to pay in *restitution*, notwithstanding the amount of discretionary LFOs at issue here, requires Ms. Ralston to secure employment which pays her approximately \$10,000 per month. Resp. Br. at 8. It further acknowledges this amount may be higher depending on the costs of her medical care as she ages. Resp. Br. at 8.

Thus, the State acknowledges the burden imposed by Ms. Ralston's financial obligations is so extraordinary that even without the discretionary costs Ms. Ralston must obtain employment providing a six-figure salary upon her release from prison. Resp. Br. at 7-9. Despite these concessions, the State argues the trial court was correct to find Ms. Ralston had the ability to pay under RCW 10.01.160(3) because the record supports the court's findings that Ms. Ralston will be "employable." Resp. Br. at 10; CP 19. This Court should reject this argument.

Simply because an individual may be able to find *a* job does not suggest that the person will have the ability to pay \$294,115.73 in restitution plus an additional \$43,456.87 in discretionary LFOs. The State's own calculations demonstrate that Ms. Ralston would be

required to secure not just employment, but extremely high-paying employment, to pay even the restitution amount.

The record does not show Ms. Ralston was previously able to secure a six-figure salary, and her work history and felony record indicate that she will not be able to secure one in the future. As the State explained to the trial court, Ms. Ralston was convicted for stealing merchandise while working in a prior position in retail, and the current convictions involved stealing from her employer. RP 4.

In addition, she has no other financial resources at her disposal because she is in the process of divorcing her husband and the family's home is in foreclosure. RP 8. It defies logic to suggest Ms. Ralston will be capable of paying back the enormous amount of LFOs imposed against her.

The trial court failed to comply with the requirements of RCW 10.01.160(3) when it adopted the State's argument that because Ms. Ralston was able-bodied, she was "employable" and therefore able to pay the legal financial obligations. CP 19. As the State now concedes, this is not the appropriate standard under *Blazina*. 182 Wn.2d at 838; Resp. Br. at 9.

Where the trial court fails to apply the correct statutory standard, reversal is required. *City of Richland v. Wakefield*, 186 Wn.2d 596, 605, 380 P.3d 459 (2016). Because the record shows Ms. Ralston does not have the ability to pay the legal financial obligations imposed, this Court should hold that the trial court's finding to the contrary was clearly erroneous and remand her case with instructions to strike the discretionary LFOs. *See State v. Bertrand*, 165 Wn. App. 393, 404, 267 P.3d 511 (2011) (holding that where a trial court's findings that a defendant has the ability to pay lacks support in the record, it is clearly erroneous).

2. Ms. Ralston was denied the effective assistance of counsel at her LFO hearing.

Defense counsel's representation of Ms. Ralston at the LFO hearing was deficient. *See State v. McFarland*, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1998) (an attorney renders constitutionally inadequate representation when he or she engages in conduct for which there is no legitimate strategic or tactical basis). In response to the State's argument that Ms. Ralston was able-bodied, defense counsel failed to direct the court to the correct statutory standard and simply

argued that Ms. Ralston would be unable to return to a job “handling finances.” RP 5-6.

Defense counsel also did not direct the court’s attention to the fact that Ms. Ralston was required to pay \$294,115.73 in restitution or that the amount of LFOs at issue totaled an unusually high amount: \$43,456.87. Only *after* the court determined Ms. Ralston had the ability to pay the previously imposed LFOs did the court investigate the actual amount at issue.¹ CP 9.

The State argues that this was unnecessary because the trial court was aware of the amount of restitution and LFOs previously imposed. Resp. Br. at 13. However, the record shows the trial court did not consider, or even discover, this information until *after* it determined Ms. Ralston had the ability to pay, effectively, any amount ordered by the court because she was able-bodied. CP 9. Defense counsel’s failure to direct the court to this information in response to the State’s request for discretionary LFOs was both deficient and extraordinary prejudicial to Ms. Ralston. *Strickland v. Washington*,

¹ In response to Ms. Ralston’s argument that defense counsel seemed unaware of the amount at issue, the State argues the trial court’s question to the defense could be interpreted differently. *See* Resp. Br. at 12. This is true, but does not change the fact that defense counsel failed to alert the court, or address in any way, the actual amount of LFOs and restitution at issue.

466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Estes*, 193 Wn. App. 479, 372 P.3d 163 (2016).

In addition, defense counsel failed to alert the court to the fact that this Court had imposed an additional \$4,244.52 in appellate costs. The State claims this was unnecessary because appellate costs were not properly considered as part of the judgment and sentence. RP 13. However, RAP 14.6(c) directs that such costs “may be enforced as part of the judgment in the trial court.” Because appellate costs become part of the trial court’s judgment, defense counsel should have alerted the court to the additional amount of discretionary LFOs imposed by this Court.

There is a reasonable probability that had defense counsel addressed the relevant statutory standard in its argument to the trial court, and discussed the nature of the burden imposed by the extremely high amount of discretionary LFOs, the trial court would have reached a different conclusion. Our supreme court granted review and remanded Ms. Ralston’s case solely for the purpose of requiring the trial court to conduct the proper inquiry under RCW 10.01.160(3) and its decision in *Blazina*, 182 Wn.2d at 839. The trial court failed to

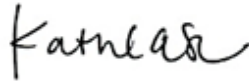
conduct the necessary inquiry and defense counsel failed to provide the effective assistance of counsel. This Court should reverse.

B. CONCLUSION

For the reasons stated above and in her opening brief, this Court should reverse the order of legal financial obligations imposed against Ms. Ralston and remand her case to the trial court with instructions to strike the discretionary LFOs.

DATED this 22nd day of September, 2017.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Kathleen A. Shea".

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